



Office of the Attorney General
State of Texas

January 22, 1997

DAN MORALES
ATTORNEY GENERAL

Mr. John A. Riley, Director
Litigation Support Division
Texas Natural Resource Conservation Commission
P. O. Box 13087
Austin, Texas 78711-3087

OR97-0112

Dear Mr. Riley:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 103101.

The Texas Natural Resource Conservation Commission (the "TNRCC") received a request for "all public records, papers, permits, permit application, documents, samples, specimens and sample results and files" regarding International Grating, Inc. ("International") plant. You state that TNRCC has made available to the requestor all information which it considers to be public information. However, you assert that the submitted information may be withheld from disclosure pursuant to sections 552.103, 552.111, and 552.107 of the Government Code. You have identified the documents that are responsive to the request and submitted a representative sample of those documents for our review.¹ We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. TNRCC has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. TNRCC must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that there is an enforcement action pending against International, which action "may be resolved through settlement, administrative hearing, or trial." We have reviewed the documents for which TNRCC has asserted section 552.103(a) as an exception and conclude that they are related to the pending enforcement action against International. Therefore, TNRCC may withhold those documents under section 552.103(a). We note that when the opposing party in the

¹We note that you have segregated the submitted information by each specific exception claimed, therefore, our ruling addresses each category of information based on the specific exception raised.

litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a).² Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. Section 552.107(1) excepts information from disclosure if:

[I]t is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 (1990) at 5. Section 552.107(1) does not protect purely factual information unless the factual information constitutes a confidence that the client related to the attorney. *See id.* at 5. We have reviewed the submitted information for which you raised section 552.107(1) as an exception, and we are unable to determine and you have not explained how the information constitutes confidential client communications or attorney legal advice or opinion. Therefore, we conclude that these records may not be withheld pursuant to section 552.107(1).

Section 552.111 of the Government Code excepts from required public disclosure the following information:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policy-making processes of the governmental body. An agency's policy-making functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. Section 552.111 also excepts from required public disclosure a preliminary draft of a letter or document related to policy-making matters, since drafts represent the advice, opinion, and recommendation of the drafter as to the form and content of the final document. Open Records Decision No. 559 (1990). We have marked the information that the TNRCC may

²Furthermore, under such circumstances, neither section 552.107 nor section 552.111 would except the submitted documents from disclosure.

withhold under section 552.111. The remaining information may not be withheld under section 552.111.

We are resolving this matter with an informal letter ruling rather than with a published open records decision.³ This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have any questions about this ruling, please contact our office.

Yours very truly,



Sam Haddad
Assistant Attorney General
Open Records Division

SH/cbh

Ref: ID# 103101

Enclosures: Marked documents

cc: Ms. Linda S. Somerville
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(w/o enclosures)

³In reaching our conclusion, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.